

Who Owns the Health Care Enterprise: Is the Not-for-Profit Form Obsolete?

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Overview

Context

NFPs and FPs

Judicial Trends

FTC/DOJ Role

Policy Implications

Regulatory Context

Assumptions

No operational differences between for-profit and not-for-profit

Courts often treat them as operating similarly

Questions

Whose interests should be promoted?

Is the not-for-profit form obsolete?

Implications for competition policy?

Why Continue to Support NFPs?

Different long-term mission

Community benefit/community input

Ownership status important in some communities (NYC hospital closure)

Serving the uninsured

Keeping FPs honest

Public accountability

Controversies Surrounding NFPs

Failure to meet community obligations

Constraints on capital formation

Role of joint ventures with FPs

Conversions

Distribution of assets

Community benefit

Counterfactual: Suppose FPs Predominate?

Greater return to communities?

Less public accountability?

Who will serve/locate in underserved
areas?

Advantage of market discipline?

Judicial Trends

Relevant case types

Antitrust

Conversions

Joint ventures

Tax exemption challenges

Judicial Trends (cont'd)

Operational convergence between FPs/NFPs

Failure to define community

Who represents the community left undecided

How to distribute assets to benefit the community a mystery

Role of covenants (*Butterworth*)

Judicial Trends (cont'd)

Judicial deference to boards of directors

But few limits

Merger cases losing

Integration, risk-sharing, efficiencies as defenses

No consistent protection of community interests

Failure to define fiduciary obligations

FTC/DOJ Role

Neutrality between FPs/NFPs

NFPs dominant at least in short-term

Monitor competitive environment

NFPs must meet community obligations

NFPs cannot use status to gain competitive advantage

FTC/DOJ Role (cont'd)

Coordinate response with IRS

Use Guidelines to define community

Ensure community benefit in conversions

Consider new rules/regulations for NFP capital formation

Issues for Executives/Trustees

Fiduciary duties

Complementary to competition policy

Balance margin and mission

Community benefit

Accountability

Capital formation

Policy Implications

NFPs not disappearing any time soon

FTC/DOJ must play traditional role of monitoring markets to restrict use of market power

Ensure that NFPs perform their mission

Scrutinize conversions to ensure community benefit met

Key role is public accountability

Conclusion: Why Should We Care?

Mission matters

Reliance on fiduciary duties to balance mission and margin

Reliance on government to hold trustees/executives accountable

Do we intend to hold the entity to its community obligations?

Do we have alternative mechanism for providing care to uninsured?

Who owns the health care enterprise is still in flux